Supreme Court, U.S.
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No. 92-1841

# In the Supreme Court of the United States

OCTOBER TERM, 1993

RONALD P. SHIRK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTIONS PRESENTED

1. Whether the jury was properly instructed on the standard of willfulness required under the anti-structuring provisions of 31 U.S.C. 5322(b) and 5324(3).

2. Whether a structuring violation requires proof that petitioner accumulated more than $10,000 for deposit and then made multiple deposits of less than $10,000 each, rather than making multiple deposits to keep from accumulating $10,000.

3. Whether the court of appeals properly reversed a downward departure upon concluding that none of the reasons stated by the district court was an appropriate ground for departure.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 11 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *American Surety Co.* v. *Sullivan*, 7 F.2d 605 (2d Cir. 1925) | 6-7 |
| *Cheek* v. *United States*, 498 U.S. 192 (1991) | 6 |
| *Ratzlaf* v. *United States*, cert. granted, No. 92-1196 (Apr. 26, 1993) | 7, 11 |
| *United States* v. *Davenport*, 929 F.2d 1169 (7th Cir. 1991), cert. denied, 112 S. Ct. 871 (1992) | 8, 9 |
| *United States* v. *Lieberman*, 971 F.2d 989 (3d Cir. 1992). | 10 |
| *United States* v. *Ratzlaf*, 976 F.2d 1280 (9th Cir. 1992), cert. granted, No. 92-1196 (Apr. 26, 1993) | 7 |
| *United States* v. *Scanio*, 900 F.2d 485 (2d Cir. 1990) | 5 |


Statutes, regulations and rules:


| | |
|---|---|
| Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525, 106 Stat. 4064 (31 U.S.C. 5324(a)(3)) | 2 |
| 18 U.S.C. 3553(b) | 10 |
| 18 U.S.C. 3553(c) | 10 |
| 18 U.S.C. 3742(e)(3) | 10 |
| 31 U.S.C. 5322 | 6 |
| 31 U.S.C. 5322(b) | 2, 7 |
| 31 U.S.C. 5324 | 2, 8, 9 |
| 31 U.S.C. 5324(3) | 2, 5, 6 |
| Model Penal Code and Commentaries (Official Draft and Revised Comments 1985) | 6, 7 |

Regulations and rules—Continued: Page

31 C.F.R.:
Section 103.11(p) ..... 8
Section 103.22(b) ..... 2
Section 103.22(c) ..... 2
Sentencing Guidelines:
§ 2S1.1(b)(2)(E) ..... 4
§ 2S1.3(a)(1)(A) ..... 4
§ 2S1.3(b)(1) ..... 6, 10
§ 2S1.3(b)(2) ..... 4

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B35) is reported at 981 F.2d 1382.

### JURISDICTION

The amended judgment of the court of appeals (Pet. App. A1-A2) was entered on March 31, 1993. The petition for a writ of certiorari was filed on May 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on two counts of willfully structuring currency transactions, in violation of 31 U.S.C. 5324(3) and 5322(b).[1] Departing downward from the Sentencing Guidelines range, the district court sentenced petitioner to nine months in prison. The court of appeals affirmed the conviction, but vacated the sentence and remanded with instructions to sentence petitioner within the Guidelines range.

1. Petitioner owns a large wholesale firearm distributorship. From January 1, 1987, to March 5, 1989, petitioner made 44 currency deposits in amounts over $10,000 at the Lebanon Valley National Bank. At the time, petitioner had an exemption allowing him to deposit up to $20,000 without having a currency transaction report (CTR) filed.[2] During the week of March 13, 1989, the bank advised petitioner of the revocation of his exemption. From that point until February 14, 1990, petitioner made approximately 88 currency deposits, principally at the same bank. None of those deposits, however, exceeded $10,000. Pet. App. B2-B5.

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[1] We note that on October 28, 1992, Congress amended 31 U.S.C. 5324. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525, 106 Stat. 4064. What was formerly 31 U.S.C. 5324(3) was unaffected in substance, but that provision will be recodified as 31 U.S.C. 5324(a)(3). For purposes of simplicity, we refer to the version in effect when the court of appeals issued its decision.

[2] Under applicable regulations, a bank may exempt retailers whose sales are "in substantial portions by currency" where the deposits do not exceed amounts "commensurate with the customary conduct of the lawful, domestic business of that customer." 31 C.F.R. 103.22(b) and (c).

In addition, on February 6, 1990, petitioner made a cash sale of $30,000. Petitioner made no corresponding deposit, but made currency deposits of $9,000, $7,000, $9,300, and $7,000 on February 7, 8, 12, and 13, 1990, respectively. Pet. App. B4.

On September 6, 8, and 13, 1989, petitioner used cash to purchase money orders of $9,500, $9,800, and $9,500, respectively. Later that month, petitioner used those money orders to buy property at a real estate closing. Pet. App. B4.

During the execution of a search warrant at petitioner's business premises on February 14, 1990, an Internal Revenue Service (IRS) agent asked petitioner if he kept any currency on the premises. Petitioner replied that he had between one and two million dollars stored in a basement safe. After securing additional warrants, IRS agents seized $1,481,100 in $100 bills, 700 $20 gold pieces, and 3,748 silver dollars from the basement safe. In another safe on the premises, agents found $149,900 in $100 bills, $80,680 in smaller denomination bills, and several hundred gold coins. Pet. App. B2-B3.

Petitioner told one of the agents that the $80,680 in smaller bills was working capital. He stated that he was going to deposit that money in amounts under $10,000 so that no CTRs would be filed with the IRS. Petitioner asked the agent if that was illegal. Pet. App. B3.

2. With respect to the structuring charges, the jury was instructed as follows:

> There are three elements that must be proven beyond a reasonable doubt in connection with these two [structuring] charges: First, that the defendant willfully structured or assisted in structuring or attempted to structure a currency transaction. Secondly, that the purpose of the structured transaction was to evade the reporting requirement that the bank had * * *. And, third, that the

transaction involved one or more domestic financial institutions * * *.

If these elements are proved you may find a defendant guilty of this offense whether or not the bank or the financial institution filed or failed to file a true and accurate currency transaction report. In other words, if you find beyond a reasonable doubt that the defendant intentionally structured his currency transactions for the purpose of evading the reporting requirement that had been imposed upon the bank, then you may find the defendant guilty as charged. If you do not so believe that he acted with this in mind, then you must find him not guilty.

* * * * *

Obviously to find a person guilty of this offense he would have to have known about the requirement imposed upon the bank, and he would have to [have] knowingly and willfully acted in such a way in dealing with his depositors to know that what he was doing would avoid the necessity for the bank to file the report.

C.A. App. 460-461.[3]

At sentencing, the district court calculated an offense level of 17 under the Sentencing Guidelines—resulting in a sentencing range of 24-30 months in prison. Pet. App. B6.[4] The court departed downward to impose a sen-

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[3] Petitioner was also indicted on eight counts of tax evasion and one criminal forfeiture count. He was acquitted on the tax counts and settled the forfeiture count. Pet. App. B5.

[4] Petitioner's base offense level was 13 under Sentencing Guidelines § 2S1.3(a)(1)(A). That level was adjusted upward by four levels under Sections 2S1.3(b)(2) and 2S1.1(b)(2)(E) because petitioner structured more than $600,000.

tence of nine months in prison. The court reasoned that (1) petitioner had been acquitted of the criminal tax charges; (2) he apparently structured only legitimate business proceeds; (3) he may not have realized structuring was a crime; and (4) he was subject to substantial forfeiture. *Id.* at B31.

3. a. The court of appeals affirmed petitioner's convictions. The court rejected petitioner's claim that a willful violation of 31 U.S.C. 5324(3) required proof that he knew that structuring was illegal. Pet. App. B14-B20. The court, however, held that the willfulness requirement was satisfied if petitioner "(1) knew that the bank was legally obligated to report currency transactions exceeding $10,000 and (2) intended to deprive the government of information to which it is entitled." *Id.* at B15 (quoting *United States* v. *Scanio*, 900 F.2d 485, 491 (2d Cir. 1990)). The court ruled that those requirements were covered by the jury instructions in this case. Pet. App. B19-B20.

The court also rejected petitioner's contention that a defendant could violate the structuring laws only if he broke down an existing pool of funds, or cash hoard, of more than $10,000 to make deposits of less than $10,000. Pet. App. B7-B13. The court ruled that "[n]either the statute nor the regulations require the [g]overnment to prove the existence of a cash hoard in excess of $10,000 to obtain a conviction." *Id.* at B8.

b. On the government's cross-appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. The court reasoned that the Guidelines adequately considered each of the four grounds relied upon by the district court in departing downward from the Guidelines range. First, the court noted that petitioner's acquittal of the tax offenses "does not in any way diminish his culpability for the structuring offenses he committed, and does not make [petitioner's] conviction

'atypical' under the Guidelines." Pet. App. B31. Second, because the Guidelines provide for sentence enhancement if defendant knows that structuring involves criminal proceeds (see Guidelines § 2S1.3(b)(1)), the court held that the base offense level reflected the appropriate degree of punishment where no such proceeds were involved. Pet. App. B31-B32. Third, although petitioner may not have known that structuring was illegal, the court determined that he was not entitled to a downward departure because his offense nevertheless required a culpable mental state. *Id.* at B32. Fourth, because the Guidelines separately address forfeiture, the court of appeals concluded that the Sentencing Commission had accounted for the possibility of forfeiture in establishing the appropriate Guidelines range for imprisonment. *Id.* at B32-B33.

## ARGUMENT

1. Petitioner argues (Pet. 6-19) that the standard for proving a "willful" violation of federal currency reporting requirements should mirror the subjective standard applied in criminal tax cases under *Cheek* v. *United States*, 498 U.S. 192 (1991). We believe that a "willful[] violat[ion]" (31 U.S.C. 5322) of the anti-structuring provisions of 31 U.S.C. 5324(3) requires proof that a defendant knew about the reporting requirements and acted with the intent to evade them. That view is consistent with the Model Penal Code's conclusion that "[a] requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." Model Penal Code § 2.02(8), at 227 (Official Draft and Revised Comments 1985);[5] see *American Surety Co.* v. *Sullivan*, 7 F.2d 605,

[5] As the commentary to the Code noted, that distillation of the "wilfulness" requirement "follows many judicial decisions as well

606 (2d Cir. 1925) (L. Hand, J.) ("The word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.") (citing cases). The jury instruction in this case—which required the government to prove that "the purpose of the structured transaction was to evade the reporting requirement that the bank had" (Pet. App. B19)—accordingly satisfied the willfulness requirement of Section 5322(b).

Although the court of appeals properly affirmed petitioner's conviction, this Court recently granted a petition for a writ of certiorari on the question of what constitutes a willful violation of the anti-structuring provision at issue here. See *Ratzlaf* v. *United States*, cert. granted, No. 92-1196 (Apr. 26, 1993). In *Ratzlaf*, the Ninth Circuit held that a willful violation of the prohibition against currency structuring does not require knowledge that structuring is unlawful. See *United States* v. *Ratzlaf*, 976 F.2d 1280, 1283-1287 (1992). Because there is a conflict in authority on that issue, the government acquiesced in the petition for a writ of certiorari in *Ratzlaf*. Accordingly, the Court may wish to hold this petition and dispose of it in light of the resolution of *Ratzlaf*.

2. Petitioner contends (Pet. 19-24) that a violation of the anti-structuring statute requires proof that petitioner had an accumulated cash sum in excess of $10,000 and then broke it into smaller amounts for deposit. He contends that merely making frequent deposits of business proceeds for the purpose of evading the CTR requirement is insufficient to sustain a conviction for structuring.

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as legislation in a number of states." Model Penal Code, *supra*, § 2.02, Comment 10, at 248 & nn.44-45.

The court of appeals correctly held that neither 31 U.S.C. 5324 nor its implementing regulations suggest that structuring may occur only by breaking down an existing cash hoard. Pet. App. B8. Under the plain language of the statute, if a defendant deposits cash business receipts for the purpose of preventing the accumulation of enough cash to trigger a CTR, he has "structured" that transaction for the purpose proscribed by Section 5324. The pertinent regulations confirm that conclusion, providing that "a person structures a transaction if that person * * * conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements." 31 C.F.R. 103.11(p). While the existence of a cash hoard may facilitate proof of intent, it is not an essential element of the offense.[6]

Petitioner argues (Pet. 23) that structuring cases since 1986 have all involved cash hoards in excess of $10,000. However, he has not cited, and we are unaware of, any decision holding that a defendant cannot commit unlawful structuring if, for the purpose of evading the CTR requirement, he structures his transactions to prevent the accumulation of $10,000. In the absence of a conflict in authority, petitioner's argument does not merit further review.[7]

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[6] If it were otherwise, an individual could easily evade Section 5324's requirements simply by instructing his debtors to make serial cash payments to him in amounts less than $10,000. Under petitioner's view, because the individual would never accumulate a cash hoard of $10,000, the prohibitions of Section 5324 would not be triggered.

[7] Petitioner cites (Pet. 22) *United States* v. *Davenport*, 929 F.2d 1169, 1173 (7th Cir. 1991), cert. denied, 112 S. Ct. 871 (1992), for its observation that the "eva[sion]" to which Section 5324 refers is the attempt to "split up a cash hoard" in a way that hinders the

3. Petitioner contends (Pet. 24-29) that the court of appeals erred in reversing the district court's decision to depart downward from the Sentencing Guidelines range.

Petitioner does not argue that the court of appeals erred in ruling that the Guidelines adequately account for each of the factors cited by the district court in departing downward from the Guidelines range. Rather, petitioner argues (Pet. 27) that the district court "may have expressed itself with imperfect precision" and may well have meant to depart on the ground that petitioner lacked the intent to evade taxes or advance other criminal objectives through his structuring activity.[8] In short, petitioner argues that the court of appeals should have reviewed the downward departure not on the basis of the reasons articulated by the court, but on an alternative basis that the district court might have offered but did not.

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detection of certain crimes. *Davenport*, however, did not present the question whether a defendant violates Section 5324 if he prevents the accumulation of $10,000 for the purpose of evading the CTR requirement. Rather, it involved the distinct question whether the Davenports committed more than one structuring offense when they broke $100,000 in cash into a number of separate cash deposits of less than $10,000 each. 929 F.2d at 1171. Thus, the dictum upon which petitioner relies is not relevant to the issue here. Indeed, the court in *Davenport* also noted that "'structur[ing] any transaction' means altering the form of the transaction in order to avoid activating the bank's duty to file a [CTR]." *Id.* at 1173. *Davenport* therefore supports the court of appeals' interpretation of Section 5324 in this case.

[8] Petitioner also notes that he may have been entitled to a downward departure because he feared that his entire business would be forfeited. Pet. 27 n.12. Even if that had been a ground for the district court's decision, petitioner does not cite, and we are unaware of, any decision holding that fear of forfeiture is a basis for a downward departure from the Guidelines range.

Under 18 U.S.C. 3553(b), a district court must sentence a defendant within the applicable Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines." In determining whether to depart, moreover, the district court must set forth "the specific reason" for imposing a sentence outside the Guidelines range. 18 U.S.C. 3553(c). And in reviewing a departure, the court of appeals must determine whether the sentence is "unreasonable, having regard for * * * the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." 18 U.S.C. 3742(e)(3).

Under that scheme, the court of appeals correctly reviewed the downward departure based on the reasons given by the district court. See *United States* v. *Lieberman*, 971 F.2d 989, 995 (3d Cir. 1992) ("If the circumstances relied upon by the sentencing court to justify departure were adequately considered by the Sentencing Commission, then its decision to depart must be reversed."). In addition, even if petitioner's structuring offense was committed without an intent to further other criminal activity, the court of appeals correctly noted (Pet. App. B32) that the pertinent Guideline specifically takes that consideration into account, by providing for a four-level enhancement if the defendant knew or believed that the structured funds were criminally derived. See Guidelines § 2S1.3(b)(1). Because the Guidelines adequately account for the factor upon which petitioner seeks a departure, further review is unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be held for *Ratzlaf* v. *United States*, No. 92-1196, and be disposed of in light of the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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